

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

10/22/2001

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

M. Cearfoss
Deputy

LC 2000-001992
(consol. for appeal)

FILED: _____

STATE OF ARIZONA

BRIAN W ROCK

v.

FRANK MAGARELLI
MILO J. FENCL
G. ROBERT MUTSCHLER
RUTH VAN BRUNSCHOT

ALLEN B BICKART

PHX MUNICIPAL CT
REMAND DESK CR-CCC

RULING

AFFIRM/REMAND

PHOENIX CITY COURT

Cit. No. 8707603
8707600
8707602
8707604

This Court has jurisdiction of these appeals consolidated¹ in LC 2000-001992 pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and the Court has considered and reviewed the records of the proceedings from the Phoenix City Court, the exhibits made of record and the

¹ This Court granted Appellee's Motion to Consolidate in a minute entry dated July 25, 2001.

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memoranda of counsel. This Court heard oral argument on September 17, 2001, and this case has been under advisement since that date.

Appellants are all owners/operators of businesses within the city of Phoenix which may be characterized as social clubs which charge a membership fee and entrance fee permitting its customers to engage in or to view live sex acts on the premises. All Appellants were accused of violating Phoenix City Code Section 23-54, as amended. This ordinance provides in Subsection B that " it shall be unlawful for any person to operate and maintain a live sex-act business." A live sex-act business is defined as "...any business in which one or more persons may view, or may participate in, a live sex act for a consideration."² All Appellants were accused of maintaining a live sex-act business within the months of February or March of 1999. Appellants filed Motions to Dismiss which were heard by the trial judges after an evidentiary hearing. In many cases, Appellants relied upon transcripts of testimony taken at others' evidentiary hearings. Nearly identical testimony and evidence was presented to each of the trial judges who heard Appellants' cases. The lower court judges denied Appellants' Motions to Dismiss finding the city ordinance at issue constitutional. The issues Appellants raise on appeal are those primarily addressed in their Motions to Dismiss. All Appellants were found guilty of violating Phoenix City Code Section 23-54, a class 1 misdemeanor offense. All Appellant's have filed timely Notices of Appeal.

1. Standard of Review

Appellants raise a number of issues of constitutional dimension and statutory construction. In matters of statutory interpretation, the standard of review is *de novo*.³ However, the appellate court does not reweigh the evidence.⁴ Instead, the

² Phoenix City Code Section 23-54(B)(3).

³ In re: Kyle M., _____ Ariz. _____, 27 P.3d 804, 805 (App. 2001). See also, State v. Jensen, 193 Ariz. 105, 970 P.2d 937 (App. 1998).

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evidence is reviewed in a light most favorable to affirming the lower court's ruling.⁵ Appellate courts must also review the constitutionality of a statute *de novo*.⁶

2. Vagueness of Ordinance

There is a strong presumption in Arizona that questioned statutes and ordinances are presumed to be constitutional, and the party asserting its unconstitutionality has a burden of clearly demonstrating the unconstitutionality.⁷ Whenever possible, a reviewing court should construe an ordinance so as to avoid rendering it unconstitutional and resolve any doubts in favor of constitutionality.⁸ A statute is unconstitutionally vague if it fails to give persons of average intelligence reasonable notice of what behavior is prohibited, or if it is drafted in such a manner that permits arbitrary and discriminatory enforcement.⁹ A statute or ordinance may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.¹⁰ Due process does not require that a statute or ordinance be drafted with absolute precision.¹¹ Whenever the language of a legislative enactment is unclear, the courts must strive to give it a sensible

⁴ Id.

⁵ 27 P.3d at 805; State v. Fulminate, 193 Ariz. 485, 492-3, 975 P.2d 75, 82-83 (1999).

⁶ McGovern v. McGovern, No. D-125189, 2001 WL 1198983, at 2 (Ariz. App. Div. 2 Oct. 11, 2001); Ramirez v. Health Partners of Southern Arizona, 193 Ariz. 325 330-31, 972 P.2d 658, 663-64 (App. 1998).

⁷ State v. Lefevre, 193 Ariz. 385, 389, 972 P.2d 1021, 1025 (App. 1998); Larsen v. Nissan Motor Corporation in the United States, 194 Ariz. 142, 978 P.2d 119 (App. 1998).

⁸ Id.

⁹ State v. Lefevre, *supra*; State v. Steiger, 162 Ariz. 138, 781 P.2d 616 (App. 1989).

¹⁰ Recreational Developments of Phoenix, Incorporated v. City of Phoenix, 83 F.Supp.2d 1072, 1087 (D. Ariz. 1999), citing City of Chicago v. Morales, 527 U.S. 41, 119 S.Ct 1849, 144 L.Ed.2d 67 (1999).

¹¹ State v. Lefevre, *supra*; State v. Takacs, 169 Ariz. 392, 819 P.2d 978 (App. 1991), citing Fuenning v. Superior Court, 139 Ariz. 590, 680 P.2d 121 (1983).

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construction and, if possible, uphold the constitutionality of that provision.¹²

In support of their arguments, Appellants' claim in their memorandum at page 6 that "a live sex act as defined by the (ordinance) can mean almost any act inside any establishment that a detective subjectively does not like." Appellants claim that a kiss or inadvertent and unintentional brushing of two bodies as they pass could violate the City ordinance at issue in this case. The ordinance defines a "live sex act" as:

Live sex act means any act whereby one or more persons engage in a live performance or live conduct which contains sexual contact, oral sexual contact, or sexual intercourse.¹³

Oral sexual contact, sexual contact, and sexual intercourse are also defined as follows:

5. Oral sexual contact means oral contact with the penis, vulva or anus.

6. Sexual contact means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact.

7. Sexual intercourse means penetration into the penis, vulva or anus by any part of the body or by any object or manual

¹² State v. Fuenning, *supra*; see Maricopa County Juvenile Action No. JT9065297, 181 Ariz. 69, 887 P.2d 599 (App. 1994), citing State v. Wagstaff, 164 Ariz. 485, 794 P.2d 118 (1990).

¹³ Phoenix City Code Section 23-54(B)(2).

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masturbatory contact with the penis or
vulva.¹⁴

The specific definitions within the city ordinance make it unlikely that an innocent person would engage in the conduct prohibited by the ordinance. The definitions also make it clear what conduct is prohibited as a live sex act. Judge Silver of the United States District Court came to a similar conclusion in Recreational Developments of Phoenix, Incorporated v. City of Phoenix.¹⁵ All Appellants filed in Federal District Court for a preliminary injunction against enforcement of Phoenix City Code Section 23-54, as amended. Judge Silver noted in regard to the vagueness claim made by the Plaintiffs (now Appellants):

As the Supreme Court has noted, "[i]t will always be true that the fertile legal 'imagination' can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question'" (citation omitted). Plaintiffs have engaged in such creative thinking, but the Court is unconvinced that a person of ordinary intelligence would not be able to determine how to conform his or her conduct to the ordinance. Accordingly, Plaintiffs' vagueness challenge is without merit and will be dismissed.¹⁶

This Court finds that the Phoenix City Code ordinance is not vague.

3. Overbreadth of Ordinance

Appellants' claim that the Phoenix City ordinance is unconstitutional because it is unconstitutionally overbroad:

¹⁴ Phoenix City Code Section 23-54(B)(5-7).

¹⁵ 83 F.Supp.2d at 1088-89.

¹⁶ Id.

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"It sweeps within its tentacles other activities that are constitutionally protected."¹⁷ An overbroad statute or ordinance is a law that criminalizes conduct which is lawful and cannot be constitutionally made unlawful.¹⁸ As with their vagueness claim, Appellants claim that the statute is overbroad because it can apply to conduct entitled to protection by the First Amendment to the United States Constitution. However, a person to whom a statute or ordinance may constitutionally be applied, does not have standing to challenge that statute or ordinance simply because it could be applied unconstitutionally in other hypothetical cases.¹⁹ The only exception to this standing requirement is where a law "substantially abridges the First Amendment rights of other parties not before the court."²⁰ There is no First Amendment protection for physical sexual conduct.²¹ It is clear that Appellants' businesses fall squarely within the conduct proscribed by the Phoenix City Code in Section 23-54. Appellants, therefore, lack standing to challenge that ordinance as overbroad because it is not overbroad as applied to Appellants and no First Amendment rights of other parties not before this Court are affected by the ordinance. For these reasons, this Court rejects Appellants' contentions that the ordinance is overbroad.

4. Due Process and *Ex Post Facto* Claims

Appellants claim that the Phoenix City Code Section 23-54, as amended, violates their due process rights because it creates a crime of strict liability. Appellants also claim that this city ordinance is an *ex post facto* form of legislation because Appellants owned and operated their businesses prior to the passage of the city ordinance. The language of the ordinance makes it clear that it requires a general criminal intent to

¹⁷ Appellants' Memorandum at p. 8.

¹⁸ State v. Watson, 198 Ariz. 48, 6 P.3d 752 (App. 2000).

¹⁹ State v. Musser, 194 Ariz. 31, 977 P.2d 131 (1999).

²⁰ Id., 194 Ariz. at 32, 977 P.2d at 132.

²¹ FW/PBS, Incorporated v. City of Dallas, 493 U.S. 215, 224, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); Recreational Developments of Phoenix, Incorporated v. City of Phoenix, *supra*.

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operate and maintain a live sex-act business. Appellants' claim that persons may enter their businesses and engage in live sex without Appellants' knowledge is unfounded. It is unfounded because Appellants' maintain their businesses for the express purpose of allowing their patrons to engage in or observe live sex acts.

Appellants' contention that the ordinance constitutes an improper *ex post facto* legislation is also unfounded. The city ordinance at issue was passed by the Phoenix City Council on December 9, 1998. Paragraph G of the ordinance was added by the City Council on December 16, 1998. All of the crimes that Appellants were accused were committed in February or March of 1999. It is clear that Phoenix City Code Section 23-54 was not applied to any events occurring before its enactment, and for that reason this Court rejects Appellants' arguments.

5. Eighth Amendment Violation, Selective Prosecution Claim and Various Other Alleged Infirmities

Appellants claim that the Phoenix city ordinance violates the Eighth Amendment as an excessive fine because the city ordinance contains a provision for abatement of live sex-act businesses. However, this case does not involve any abatement action brought by the City of Phoenix. Appellants were prosecuted and charged with class 1 misdemeanor offenses. This claim is without merit.

Appellants also claim, as they did before the District Court, that the city ordinance encourages and permits selective enforcement by the Phoenix police. Appellants claim that they are the victim of selective prosecution. Appellants' argument that the city ordinance is subject to strict scrutiny because it affects the fundamental rights of privacy, association and speech is misplaced. Appellants' conclusions that these fundamental rights would be affected are not supported by the record. Phoenix City Code Section 23-54 must be subject only to a "rational basis test." The Phoenix City Code section at issue

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clearly withstands such tests because of the State's interests in health concern issues.²²

This Court has carefully reviewed Phoenix City Code Section 23-54 and finds that Appellants' claims regarding that ordinance are unfounded. An important and valid State interest exists in the adoption and enforcement of that ordinance, and Appellants' objections to the ordinance are without legal merit.

6. Conclusion

For all of the reasons explained in this Court's opinion, this Court finds Phoenix City Code Section 23-54, as amended, to be constitutionally sound as passed by the Phoenix City Council and as applied by the Phoenix City Courts to Appellants.

IT IS THEREFORE ORDERED affirming the judgments of guilt and sentences imposed as to each Appellant.

IT IS FURTHER ORDERED remanding this case back to the Phoenix City Court for all future proceedings.

²² See Recreational Developments of Phoenix, Incorporated v. City of Phoenix, 83 F.Supp.2d at 1098.